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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JEAN ELIZABETH MORGAN,
Petitioner,

v.

ERIC A. FORETICH,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Dr. Eric A. Foretich, respectfully prays that Dr. Elizabeth Morgan's petition for a writ of certiorari to review the August 5, 1988, opinion of the District of Columbia Court of Appeals be denied.

STATEMENT OF THE CASE

This case should be simply a custody and visitation dispute concerning Hilary, the daughter of Dr. Eric Foretich and Dr. Elizabeth Morgan. However, because of Dr. Morgan's repeated accusations that Dr. Foretich abused Hilary, this case has grown to a "size apparently unequaled in a District of Columbia domestic relations proceeding." *Morgan v. Foretich*, 546 A.2d 407 (D.C.App. 1988) at 410. In spite of Dr. Morgan's persistent claims of sexual abuse, her allegations have not been proven.

Id. Yet, Dr. Foretich's battle to see Hilary continues, and this petition for *certiorari* is merely one of a number of tactics by Dr. Morgan to keep the litigation ball rolling and her own image in the public eye.

It is easiest to understand this petition by reviewing only the facts immediately involving it, rather than risking confusion by giving a broad brush description of the entire saga. Indeed, the panoply of issues, orders and appeals presented by Dr. Morgan in her petition seems to represent an attempt to bring more before this Court than is procedurally permitted.

On August 19, 1987, Judge Herbert B. Dixon, Jr., of the District of Columbia Superior Court, ordered a visit for Hilary with her father, Dr. Foretich, from August 22 through September 6, 1987, prior to Hilary's returning to school on September 8. Dr. Foretich's visits with Hilary had been for one hour, gradually increasing to week-ends, before the August 19, 1987, order. *Morgan v. Foretich*, 546 A.2d at 409.

Dr. Morgan's emergency motion for a stay of the visitation order pending appeal was denied by the District of Columbia Court of Appeals on August 21, 1987. Then, Dr. Morgan refused to comply with the visitation order by hiding Hilary. To this day, Dr. Foretich does not know where Hilary is or if she is safe.

On August 24, Judge Dixon issued an order to show cause why Dr. Morgan should not be held in contempt. Also on August 24, Dr. Morgan moved to recuse Judge Dixon, and to open the contempt hearing to the public, to unseal the record and to modify a closure order of April 13, 1987. After a contempt hearing on August 26, 1987, Judge Dixon found Dr. Morgan in contempt and ordered her to be incarcerated, as of August 28, 1987, until she would produce Hilary. Dr. Morgan has adamantly refused to produce Hilary and remains incarer-

ated in the D.C. Jail. On August 27, 1987, Dr. Morgan appealed the contempt judgment.

The appeal was argued before a panel of the District of Columbia Court of Appeals on April 25, 1988, and a published opinion was decided on August 5, 1988, with the court ruling on five issues. On the "principal issue," *Morgan v. Foretich*, 546 A.2d at 410, the court ruled it was not an abuse of discretion for the trial court to order the two-week visitation, because Dr. Morgan's allegations of sexual abuse had not been proven.

The court dealt with the other four issues in fairly brief form. The court rejected Dr. Morgan's claim of a defense of necessity to the contempt charge. Next, the court found that the record did not indicate that Judge Dixon should be recused, noting that Dr. Morgan's argument about bias was "significantly brought into question" because of her failure to raise it during earlier hearings. *Morgan v. Foretich*, 546 A.2d at 412. Further, the court declined to revisit the issue of closure of the August 26 contempt hearing, explaining that the court's two previous opinions, *Morgan v. Foretich*, 521 A.2d 248 (D.C.App. 1987) and *Morgan v. Foretich*, 528 A.2d 425 (D.C.App. 1987), were about the same issues. *Morgan v. Foretich*, 546 A.2d at 412. The court stated that a "good portion" of the August 26 contempt hearing was open, and the only part that was closed was Dr. Morgan's testimony when she "insisted upon reciting allegations as to specific acts of sexual abuse" on Hilary. *Id.* The court recently reemphasized its distinction that closure issues in family cases involve "special considerations." *Id.*, citing *Mokhiber v. Davis*, 537 A.2d 1100, 1108 n.8, & 1115-16 n.13 (D.C.App. 1988). Finally, the court stated that the $200,000 security posted as an appearance bond in 1986 could not be forfeited for failure to comply with the court orders of August 1987. Thus, the trial court's rulings were affirmed on all but the decision to forfeit the security. On August 30, 1988, Dr. Morgan's

motion to stay the mandate pending application for a writ of certiorari was denied, and the petition was filed in this Court on November 3, 1988.

REASONS FOR DENYING THE WRIT

I. Dr. Morgan's petition refers to issues, orders and opinions which are not properly before this Court. The petition does not define clearly issues which this Court can rule on.

This petition makes up in hyperbole what it lacks in specificity. As mentioned above, the myriad issues delectably thrown to this Court give the impression that it faces a feast of analysis. Just the opposite is the case. Dr. Morgan deftly tries to obscure the reality that there is very little about which she can properly petition this Court.

It will be helpful to illustrate some of the vague and confusing statements, to set the record straight—so to speak. First is the matter of the closure order. Dr. Morgan defines "the closure order," petition at 3, as the order issued by Judge Mencher on November 8, 1984. Clearly, a 1984 order is not reviewable in 1988. Unfortunately, although Dr. Morgan has defined "closure order," she uses that term in the petition to refer to a variety of such closure orders. According to Dr. Morgan, petition at 5, Judge Dixon clarified the November 8, 1984, closure order on November 26, 1986. Then, on April 13, 1987, Judge Dixon amended the November 26, 1986, order. Petition at 7. Dr. Morgan refers again to the closure order in petition at 9 n.10 and at 12 n.17.

This discussion of various closure orders is fine, but a "closure order" was not on appeal. The D.C. Court of Appeals very clearly described what it was reviewing in *Morgan v. Foretich*, 546 A.2d at 412 n.15. It explains that, although Dr. Morgan raised issues about the April 13, 1987, closure order, that order was not appealed and,

therefore, was not before the D.C. Court of Appeals. Dr. Morgan seems to be asserting that, because she raised the issues in her Brief to the D.C. Court of Appeals, they were "on appeal." Petition at 12 n.17. It is obvious that mentioning an issue in a brief does not transform it into a matter on appeal, when either the order from below was not appealed or the court below gave no order on that issue. Thus, the D.C. Court of Appeals points out that Dr. Morgan's motion to unseal the record and modify the closure order of April 13, 1987, were not ruled on by the trial court until September 18, 1987. Dr. Morgan's appeal was taken on August 27, 1987, and there was no appeal to the September 18, 1987, order. *Morgan v. Foretich*, 546 A.2d at 412 n.15. Once again, Dr. Morgan attempts to negate her failure to appeal the September order by lumping it in with her August 27 appeal of Judge Dixon's contempt order. Petition at 9 n.10 and at 12 n.17.

Since the D.C. Court of Appeals expressly found that the September order on unsealing the court record and modifying the closure order were not appealed from, Dr. Foretich submits that Dr. Morgan's assertion as to what issues have been appealed and may be reviewed by this Court cannot be credited. In what may seem like word games, but really is not, the D.C. Court of Appeals expressly stated that the issue on appeal was the denial on August 26 of Dr. Morgan's motion to *open* the hearing, rather than any *closure* order. Thus, even though Dr. Morgan describes the "closure order" in her Reason For Granting The Writ, in fact, there is *no closure order* to be reviewed. Equally confusing is the reference to Judge Dixon's application of the "closure order" to "transcripts and records of related proceedings, and to the parties' out-of-court statements." Petition at 22 n.32. Related proceedings and out-of-courts statements certainly were not covered in the motion to open the contempt hearing, but, presumably, in the April 13, 1987,

closure order which was not on appeal. Finally, Dr. Morgan seems to imply that the unsealing of the record is on appeal, when it is not. Petition at 19, and at 24 n.37.

The closure order confusion is not the only problem presented in Dr. Morgan's petition. She seems to want to appeal, not only long-standing closure orders, but all three opinions of the D.C. Court of Appeals, spun into one highly-charged diatribe.[1] Dr. Morgan discusses the opinions of the D.C. Court of Appeals, while absolutely foregoing any citation or even a reference as to which of the three opinions is being analyzed. For example, in the petition at 20, she quotes the (unspecified) opinion referring to a "clean slate" and the "presumption of openness." This language is from *Morgan v. Foretich*, 521 A.2d at 252 n.10. That is the first of the three opinions and definitely not available for review by this Court. Further, in the most recent opinion, the D.C. Court of Appeals expressly declined to "revisit the issues" from the two prior *Morgan* opinions. *Morgan v. Foretich*, 546 A.2d at 412.

Similarly, Dr. Morgan, in petition at 22, disparages the D.C. Court of Appeal's acceptance of Judge Dixon's

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[1] Dr. Foretich wishes to bring to this Court's attention the wholly gratuitous and demeaning comments about Judge Dixon. These comments are particularly inappropriate, in light of the extremely difficult job which Judge Dixon has been assigned. *See* comments of Hilary's guardian ad litem, praising Judge Dixon's efforts. *Morgan v. Foretich*, 546 A.2d at 412 n.13. The criticisms take on an even more unfavorable light, when viewed in the context of the appeal. Dr. Morgan did have on appeal the issue of Judge Dixon's recusal. If she were truly concerned about recusal, presumably her comments could have been presented to this Court in an organized manner as an issue on which certiorari were being sought. In addition, the D.C. Court of Appeals pointed out that the examples given by Dr. Morgan to support her claim of bias would probably have been better framed as separate assignments of error, which could then be reviewed on appeal. *Morgan v. Foretich*, 546 A.2d at 412 n.12.

findings that disclosure of the alleged sexual abuse would be "embarrassing and damaging to the child and the child's reputation, now and in the future." This, again uncited, quotation is from the second *Morgan* opinion, 528 A.2d at 426.[2] Dr. Morgan's use of the two prior D.C. Court of Appeals opinions obscures the fact that the issues in those opinions, particularly about the right to a public trial and access to documents, are not before this Court. Because Dr. Morgan has incorrectly and inadequately set out the specific issues on which she is petitioning this Court, there is no basis for this Court's review.

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[2] Dr. Foretich takes strong exception to Dr. Morgan's characterization of Judge Dixon's findings as "speculation," and that the revelation about matters extremely personal and private to Hilary could possibly or ever be merely "speculative, inchoate reputational interests." No one can question that the standard to be applied in this case is "the best interests of the child." *Morgan v. Foretich*, 521 A.2d at 252. Yet, here is the spectacle of Hilary's own mother arguing that the most basic and human of Hilary's rights are "speculative," while the mother is asserting her own "liberty interests" at the direct expense of Hilary. Dr. Morgan is literally trading away her daughter's birthright of freedom and privacy to gain some advantage for herself in terms of increased press coverage. The mere thought of this "bargain" makes any and all citizens cry with shame that this could happen in our country. Never has the tried-and-true balancing test made for a worse deal. And speaking of Hilary's rights—which rights of this poor child have been protected in the fifteen months since she has vanished? Her freedom of expression, her right to life and liberty have been absolutely violated. In a particularly cruel irony, Dr. Morgan appears to be making an effort to represent the public's right of access to proceedings. *See, e.g.*, petition at 10 n.11, expressing concern that the public will have a basis for evaluating Judge Dixon's competence; petition at 22 n.32, indicating that the public needs information to assess the "judicial response" to this case; petition at 23 n.34, citing *Waller v. Georgia*, 467 U.S. 39 (1984) at 46. Dr. Morgan worries about the public, but is blind to the obvious distinction that "family cases involve special considerations." *Morgan v. Foretich*, 546 A.2d at 412.

II. The trial court's ruling to deny Dr. Morgan's motion to open the contempt hearing did not violate her Fifth Amendment rights, particularly since the hearing was closed only for the segment of Dr. Morgan's testimony relating to specific acts of sexual abuse.

Dr. Morgan's petition alleges that her Fifth Amendment rights were violated because the proceedings were conducted largely "in secret." In this regard, Dr. Morgan's analysis is just as confused as was her discussion of what was actually being appealed. The recent Supreme Court opinions, including those cited by Dr. Morgan, about the right to an open trial have typically been couched in the Sixth Amendment, if invoked by the defendant (*Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) at 378-80), or the First Amendment, if invoked by the public or the media (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) at 580). *See United States v. Presser*, 828 F.2d 340 (6th Cir. 1987) at 343-44. In an oft-cited explanation, this Court said that the presumption of openness may be overridden if the higher interest is stated along with specific findings. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984). The D.C. Court of Appeals, in *Morgan v. Foretich*, 521 A.2d at 253, even noted that *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), specifically indicated that closure could be necessary to "protect the physical and mental well-being of a minor sex crime victim." That interest, approved in *Globe*, seems to fit rather closely the interest and rights of Hilary which were threatened by Dr. Morgan's motion to open the contempt hearing. Further, in *Waller* v. *Georgia*, *supra* at 50, this Court remanded to decide what *portions* of a suppression hearing may be closed. Thus, this Court has found that proceedings can be closed if certain interests prevail and only portions of the proceedings need be open. Those limits on the right to a public hearing describe the balancing and narrow tailoring performed by Judge Dixon. Dr. Foretich urges that the petition be

denied because Dr. Morgan's rights to an open hearing were not violated.

The particularly confusing part of the petition's analysis is its reliance on the Fifth Amendment, rather than the Sixth Amendment used in the above-cited cases. The chief case cited by Dr. Morgan, *In re Oliver*, 333 U.S. 257 (1948), discusses the Fifth Amendment concerns of a *secret* proceeding, rather than a *closed* one. Although the words could be interchangeable, in this usage, they are as different as the Fifth and Sixth Amendments. *In re Oliver* dealt with a peculiar Michigan statute, in which the judge could be a one-man grand jury. The obvious concern was the *secrecy* of the proceedings. In contrast, no secret could be worse kept than the fact that Dr. Morgan had a contempt hearing and is incarcerated. Dr. Morgan's concern is not secrecy, but openness—particularly so she can get more media play. Nothing could be more absurd than Dr. Morgan's claim that the public debate needs to be promoted, when most of her Miscellaneous Authorities are from popular newspaper, magazine and television sources. This issue has already made "60 Minutes," petition at 14 n.21, so how much more press does it really need? In addition, if Dr. Morgan can claim that much of the information about Hilary has come out in other proceedings, petition at 23, then how would repeating the allegations add to the public's knowledge? This case is nationally known, so where is the lack of "review in the forum of public opinion?" Petition at 24.

The Fifth Amendment rights which Dr. Morgan claims have been violated are not the ones she is asserting. The true Fifth Amendment rights go more to due process than to public access. For example, a potential contemnor should be given notice and a hearing. *In re Grand Jury Proceedings*, 795 F.2d 226 (1st Cir. 1986) at 234, citing, *inter alia*, *In re Oliver*, *supra* at 275; *United States v. Alter*, 482 F.2d 1016, 1023 (9th Cir. 1973). Dr. Morgan

has had ample notice that she was in violation of the court's visitation orders. *Morgan v. Foretich*, 528 A.2d at 429. Similarly, given the size of the file in this case, there can be no claim that she has been denied the right to be heard. She has been represented by any number of well-respected attorneys, so she certainly has not been denied counsel. It is clear that Dr. Morgan's Fifth Amendment due process rights have been amply protected. There is nothing under the Fifth Amendment for this Court to review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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